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No. 06-376

In the Supreme Court of the United States

JOHN F. HINCK AND PAMELA F. HINCK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, pursuant to 26 U.S.C. 6404(h) (Supp. IV 2004), the Tax Court has exclusive jurisdiction to review determinations of the Internal Revenue Service not to grant a taxpayer's request for interest abatement under 26 U.S.C. 6404(e)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 446 F.3d 1307. The opinion of the Court of Federal Claims (Pet. Supp. App. 76-106) is reported at 64 Fed. Cl. 71.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2006. The petition for a writ of certiorari was filed on July 28, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. a. If a person liable to pay any tax fails to pay the tax when due, interest accrues on the unpaid amount from the time the tax is due until the time it is paid. 26 U.S.C. 6601(a). The Secretary of the Treasury is authorized to abate a tax or liability assessment in certain circumstances. 26 U.S.C. 6404. In 1986, Congress amended Section 6404 by adding subsection (e)(1), which for the first time authorized the Secretary to grant an abatement of interest attributable to "any error or delay" in the performance of a "ministerial act" by the Internal Revenue Service (IRS). Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762. When taxpayers sought judicial review of the Secretary's decision not to grant such an abatement under subsection (e)(1), the federal courts did not permit such cases to proceed because that subsection, in contrast to other provisions that required the Secretary to abate interest, merely provided that "the Secretary may abate" interest and established no tests or standards by which to adjudicate the correctness of the determination, thus consigning the decision whether to abate interest to the Secretary's sole discretion. See *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991); see also H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985) ("The bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of certain erroneous refunds * * *.)").

b. In 1996, Congress amended Section 6404 to add present subsection (h).[1] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 302(a), 110 Stat. 1457. That subsection provides certain taxpayers with the right to obtain Tax Court review of the Secretary's determination not to abate interest, but only if they seek such review within 180 days:

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this subsection was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

26 U.S.C. 6404(h)(1) (Supp. IV 2004). The reference to 26 U.S.C. 7430 generally restricts the availability of review to individual taxpayers whose net worth does not exceed $2 million and to businesses whose net worth does not exceed $7 million. See 26 U.S.C. 7430(c)(4)(A)(ii); 28 U.S.C. 2412(d)(2)(B); H.R. Rep. No. 506, 104th Cong., 2d Sess. 28 (1996) (H.R. Rep. No. 506) ("An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees."). Section 6404(h) also provides that, if the

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[1] Section 6404(h) was initially designated Section 6404(g), by Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 302(a), 110 Stat. 1457, was redesignated Section 6404(i) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3305, 3309, 112 Stat. 743, 745, and was redesignated Section 6404(h) in 2002. See Act of Jan. 23, 2002, Pub. L. No. 107-134, § 112(d)(1), 115 Stat. 2435.

Tax Court determines that the IRS abused its discretion in declining to abate interest, that court may order a refund of some or all of the interest. 26 U.S.C. 6404(h)(2)(B) (Supp. IV 2004), 6512(b). It further provides that an order of the Tax Court under Section 6404(h) is reviewable by the courts of appeals, but "only with respect to the matters determined in such order." 26 U.S.C. 6404(h)(2)(C) (Supp. IV 2004).

At the same time that Congress added subsection (h), it amended subsection (e)(1) by adding the word "unreasonable" before the words "error or delay," and by changing the words "ministerial act" to "ministerial or managerial act." Taxpayer Bill of Rights 2, § 301(a), 110 Stat. 1457. Congress gave different effective dates to the two amendments. As a result, the present case is subject to subsection (h), but is governed by the original version of subsection 6404(e)(1).[2]

c. The Tucker Act, 28 U.S.C. 1491(a)(1), grants the United States Court of Federal Claims jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department," including tax refund actions authorized by 26 U.S.C. 7422(a). *Ibid.* Similarly, 28 U.S.C. 1346(a)(1) grants federal district

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[2] The amendments to subsection (e)(1) are effective for interest accruing with respect to deficiencies or payments for tax years beginning after July 30, 1996. Taxpayer Bill of Rights 2, § 301(c), 110 Stat. 1457. Subsection (h), however, is effective for all requests for abatement submitted to the IRS after July 30, 1996, regardless of the tax year involved. § 302(b), 110 Stat. 1458. The IRS adopted final regulations on December 18, 1998, relating to interest abatement under Section 6404(e)(1). See 26 C.F.R. § 301.6404-2. The IRS also established procedures for the processing of taxpayer requests for interest abatement. See 6 Internal Revenue Manual: Admin. (CCH) § 20.2.7, at 46,093 (Aug. 1, 2006).

courts jurisdiction, concurrent with that of the Court of Federal Claims, over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." *Ibid.* Such tax refund actions cannot be brought, in any court, "until a claim for refund or credit has been duly filed" with the IRS. 26 U.S.C. 7422(a); *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990). An administrative refund claim must be filed within two years from the date a tax is paid or three years from the time the return was filed, whichever is later. 26 U.S.C. 6511(a). Any tax refund action must be filed within two years after the date of the IRS's disallowance of the refund claim, although that period can be extended by agreement. 26 U.S.C. 6532(a)(1) and (2).

2. Petitioners filed a joint federal income tax return for 1986. Pet. App. 4. A decade later, while their 1986 tax year was under examination, petitioners made an advance remittance to the IRS. *Ibid.* Four years later, the IRS made an agreed adjustment to petitioners' 1986 liability, assessed the resulting tax and interest, and refunded to petitioners the balance of their advance remittance. *Ibid.*; Pet. Supp. App. 78-79. Petitioners subsequently filed an administrative claim for refund, which included a request that the IRS abate interest under Section 6404(e)(1). Pet. App. 4; Pet. Supp. App. 80. Two years after the IRS denied that refund request, petitioners filed suit in the Court of Federal Claims seeking review of the IRS's refusal to abate the interest. Pet. App. 4.

3. The Court of Federal Claims dismissed petitioners' suit for lack of jurisdiction. Pet. Supp. App. 76-106. The court explained that its jurisdiction in tax refund suits derives solely from the Tucker Act, 28 U.S.C. 1491(a), and not from 28 U.S.C. 1346(a)(1), which grants the federal district courts concurrent jurisdiction over tax refund suits. Pet. Supp. App. 87. Tax refund suits, the court reasoned, represent a category of cases arising under the Tucker Act that involve the illegal exaction of money. *Id.* at 85. If the decision whether to abate interest is consigned to agency discretion, the court explained, the IRS's refusal to abate interest cannot be "illegal." *Id.* at 89. The court observed that, prior to its amendment in 1996, the permissive language of Section 6404(e)(1)—*i.e.*, the use of the word "may" and the absence of any standard by which the IRS's decision might be judged—had consigned the determination whether to abate interest to the IRS's sole discretion, with the result that the IRS's determination not to abate interest under that subsection was not reviewable by the courts. *Id.* at 89-93. The court thus concluded that, before Congress granted the Tax Court review authority by enacting Section 6404(h), petitioners' claim could never have "give[n] rise to an 'illegal' exaction" and jurisdiction would have been "lacking." *Id.* at 94.

The court held that the enactment of Section 6404(h) did not change the result. The court explained that it was still "confronted with the same 'may abate' language" and that "the version of section 6404(e)(1) applicable here—in which the word 'unreasonable' is not yet included —* * * still does not give the slightest clue as to how a court might distinguish between permissible and impermissible exercises of the Secretary's discretion." Pet. Supp. App. 95 (footnote omitted). And while

"Congress undeniably has expressed the intention that some court have jurisdiction to review abatement decisions," the court observed that Congress chose the Tax Court, "not this court." *Id.* at 96. "[H]ad Congress intended to work such a fundamental change in jurisdiction or justiciability" by authorizing challenges in the Court of Federal Claims and federal district courts to the IRS's refusal to abate interest, the court reasoned, "[Congress] would have done so expressly—as it did in the case of the Tax Court—and not, as [petitioners] assert[], through a tortured web of inferences and exported standards." *Id.* at 98-99.

4. The court of appeals affirmed, but on a different ground. Pet. App. 1-17. It held that Section 6404(h) granted the Tax Court exclusive jurisdiction to review the IRS's determination not to abate interest under Section 6404(e)(1).[3] Pet. App. 11. The Federal Circuit stated that "[w]hen interpreting a statute, we look first to the language of the statute." *Ibid.* The court noted that Section 6404(h) expressly grants jurisdiction only to the Tax Court. *Ibid.* The court further observed that the statute specifies a particular procedure to be used by the Tax Court and grants it the power to issue a remedy—an order of abatement—if an action is brought within 180 days after the mailing of the final determination not to abate interest. *Id.* at 11-12. The court also noted that Section 6404(h) expressly provides a specific standard of review—abuse of discretion—to be em-

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[3] The Federal Circuit thus found it unnecessary to address either the justiciability question resolved by the Court of Federal Claims or the source of that court's jurisdiction in tax refund suits. Because the government is defending the judgment below solely on the ground on which the court of appeals relied, this Court need not address those issues.

ployed by the Tax Court in reviewing determinations regarding interest abatement. *Ibid.* Applying the plain language of the statute, the court concluded that "[b]ecause § 6404(h) provides a specific procedure for reviewing IRS determinations of interest abatement, specifies that the proper forum for those reviews is the Tax Court, and grants the Tax Court the power to issue an abatement, we conclude that Congress intended the Tax Court to be the sole forum in which denials of interest abatement claims may be challenged." *Id.* at 12.

The Federal Circuit also found it significant that the Tax Court "is a specialized court with expertise in tax matters." Pet. App. 13. It emphasized that where "statutory review procedures [are] designed to permit agency expertise to be brought to bear on particular problems, those procedures are presumed to be exclusive." *Id.* at 12 (quoting *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)).

The Federal Circuit observed that the legislative history of Section 6404(h) confirms that the Tax Court has exclusive jurisdiction over interest-abatement claims. Pet. App. 13-14. The court noted that, although Congress "recognized that the courts generally d[id] not have jurisdiction over interest abatement claims," *id.* at 14 (citing H.R. Rep. No. 506, at 28), Congress's response was not to grant jurisdiction to the district courts and the Court of Federal Claims but, instead, to vest jurisdiction only in the Tax Court. *Id.* at 13-14.

The Federal Circuit acknowledged (Pet. App. 16) that its decision was in conflict with the Fifth Circuit's decision in *Beall* v. *United States*, 336 F.3d 419 (2003). It stated, however, that the purported anomalies identified by the Fifth Circuit—that some taxpayers' interest-abatement claims would not be reviewable in any forum

and that other taxpayers would have to split their claims —did not persuade it to construe the statute differently. Pet. App. 16-17. The legislative history clearly established that Congress intended that, under Section 6404(h), taxpayers who exceeded the net-worth requirements for seeking attorney's fees under 26 U.S.C. 7430 could not seek review of the IRS's interest abatement determination. Pet. App. 16. The Federal Circuit further explained that Congress was well aware that district courts had jurisdiction over refund claims but nonetheless specifically granted only the Tax Court jurisdiction to review interest abatement requests. Thus, the fact that some claims might be split did not compel the court to ignore the clear statutory language. *Id.* at 16-17.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Tax Court has exclusive jurisdiction to review a taxpayer's action challenging the IRS's refusal to abate interest under 26 U.S.C. 6404(e)(1). The text, structure, and history of Section 6404(h) reveal that Congress intended to establish a limited remedy for adverse interest abatement determinations in the Tax Court only.

When Congress establishes a specific remedy for violation of a statutory right, the settled rule is that Congress ordinarily intends that remedy to be exclusive. That rule is fully applicable to Section 6404(h). In establishing a remedy in the Tax Court for adverse interest abatement determinations, Congress imposed specific limits on who may bring suit and when it may be brought. Under petitioners' approach, those restrictions could be evaded by the simple expedient of bringing the action in a different forum, a result that contravenes not

only Section 6404(h)'s language and structure but also principles of sovereign immunity.

Section 6404(h)'s history further demonstrates that Congress intended the remedy it provided to be the exclusive means of obtaining judicial relief. Congress was well aware that taxpayers had been unable to pursue actions seeking interest abatement under Section 6404(e)(1) in any court. Congress responded to taxpayers' inability to obtain judicial review by establishing a limited remedy in the Tax Court. Had Congress wanted to change the prevailing rule that the district courts could not adjudicate Section 6404(e)(1) claims, it could have done so in a direct and straightforward way. Nothing in the grant to the Tax Court of authority to review the IRS's interest abatement determinations for abuse of discretion implies, much less clearly indicates, that Congress intended to subject those decisions to review in the district courts and the Court of Federal Claims as well.

Petitioners' reliance on the implied-repeal canon is misplaced. At the time Congress enacted Section 6404(h), no taxpayer had been permitted by any court to obtain judicial review of an adverse interest abatement determination. Instead, the courts had held that Congress had committed interest abatement determinations under Section 6404(e)(1) solely to agency discretion. Regardless of whether those courts were correct in so holding, Congress had no reason to believe that it was repealing any preexisting taxpayer right when it provided a remedy in the Tax Court. The Court has made clear that it will not apply the implied-repeal canon in those circumstances. See *United States* v. *Estate of Romani*, 523 U.S. 517 (1998). Instead, the rule that a specific remedy forecloses resort to a general remedy is

controlling here, particularly because the tax refund mechanism that petitioners seek to invoke "creates no rights but merely provides a civil cause of action to remedy 'some otherwise defined federal right.'" *City of Ranchos Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 n.2 (2005) (quoting *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376 (1979)).

Contrary to petitioners' contentions and the Fifth Circuit's decision in *Beall*, construing Section 6404(h) to provide the exclusive remedy for adverse interest abatement determinations does not create "anomalies." Pet. App. 37. There is nothing anomalous in Congress's decision to limit the class of taxpayers who can obtain judicial review of an administrative determination for which no review was previously available. Congress has established net-worth limitations on other forms of judicial relief, and taxpayers whose net worth exceeds the limits established under the law ($2 million for individuals and $7 million for businesses) may fully protect their interests by paying their taxes up front so as to avoid the accrual of interest. Nor is there anything anomalous about requiring a taxpayer bringing a refund claim in the district court or the Court of Federal Claims to file a separate interest abatement action in the Tax Court. The vast majority of taxpayers litigate their tax disputes in the Tax Court, and those taxpayers must split their claims in any event, since an interest abatement claim does not ripen until after the Tax Court has determined that a deficiency exists. The interest abatement claim is also distinct and freestanding in nature, requiring an evaluation—under a deferential standard of review—of the internal administrative processing of a taxpayer's case. It thus makes sense to channel the initial review of such claims to a single court that can develop exper-

tise in reviewing this aspect of the tax administration process.

Finally, petitioners argue that if Section 6404(h) provides the exclusive remedy for adverse interest abatement determinations, the IRS could frustrate judicial review by simply failing to process the taxpayer's administrative claim for abatement. This Court will not presume that an agency will exercise its authority in bad faith, however, and there is no evidence that the IRS has done so.

ARGUMENT

SECTION 6404(h) OF THE TAX CODE PROVIDES THE EXCLUSIVE JUDICIAL REMEDY FOR ADVERSE INTEREST ABATEMENT DETERMINATIONS

The court of appeals correctly held that the Court of Federal Claims lacked jurisdiction over petitioners' action. Section 6404(h) of the Tax Code specifies that certain taxpayers may file an action in the Tax Court challenging the IRS's determination not to abate interest. It is well settled that when Congress creates a specific remedy for violation of a statutory right, that remedy is generally deemed to be exclusive. Petitioners cannot identify any sufficient basis for departing from that settled rule, and therefore cannot circumvent the limitations incorporated into Section 6404(h)'s remedial scheme by pursuing a tax refund suit, either in the Court of Federal Claims or in district court.

A. The Availability Of A Precisely Drawn, Specific Remedy Precludes Resort To A General Remedy

This Court has explained "[i]n a variety of contexts" that "a precisely drawn, detailed statute preempts more general remedies." *Brown* v. *GSA*, 425 U.S. 820, 834-835

(1976) (citing cases); see *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983). In particular, the Court has found that rule to be controlling when the "balance, completeness, and structural integrity" of the specific remedy suggests that it was not merely a supplement to a more general remedy but was intended by Congress to be the exclusive avenue of relief. *Brown*, 425 U.S. at 832; see *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

For example, in *Brown*, the Court held that Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (Supp. IV 1974), is the "exclusive judicial remedy" available to a federal employee claiming to have been the victim of racial discrimination in the workplace. 425 U.S. at 835. The Court in *Brown* concluded that, when Congress enacted Section 717, Congress was "persuaded that federal employees who were treated discriminatorily had no effective judicial remedy." 425 U.S. at 828. The Court also relied upon Section 717's "rigorous administrative exhaustion requirements and time limitations," observing that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 833. Because the federal employee's complaint was untimely under Section 717, the Court held that it was correctly dismissed, despite the employee's assertion of jurisdiction under other federal statutes. *Id.* at 823-824, 835.

The Court has applied the rule that Congress's enactment of a specific remedy precludes resort to general remedies to other remedial schemes as well. In *Block* v. *North Dakota*, the Court found *Brown* "instructive" in

concluding that "Congress intended the [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States' title to real property," thereby precluding challenges to the government's title to land under other theories of jurisdiction. 461 U.S. at 286. And in *United States* v. *Mottaz*, 476 U.S. 834 (1986), the Court held that the Quiet Title Act precluded an action brought under the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, because the Quiet Title Act provided the exclusive means to challenge the United States' title to real property. 476 U.S. at 841-848.[4]

Similarly, in *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 378 (1979), the Court relied on *Brown* in foreclosing relief under 42 U.S.C. 1985(3) for an alleged conspiracy to deprive the respondent of equal protection of the law, concluding that "the right[s] created by Title VII" could be asserted only within the remedial scheme that Title VII itself established. More recently, this Court held that the Telecommunications Act of 1996 provides the exclusive remedy for a violation of its provisions and thus forecloses an action brought under 42 U.S.C. 1983. *City of Ranchos Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005) ("The provision of an express, private means of redress in the statute itself is ordinarily an indication

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[4] The Court in *Mottaz* also held that the Quiet Title Act did not preclude actions under the Tucker Act seeking compensation for the government's taking of property, because the Quiet Title Act contained a savings clause providing that the Quiet Title Act does not "apply to or affect actions which may be or could have been brought under sections 1346 . . . [or] 1491 . . . of this title." 476 U.S. at 850 (footnote omitted) (quoting 28 U.S.C. 2409a(a)). No such savings clause appears in Section 6404(h).

that Congress did not intend to leave open a more expansive remedy under [another provision].").

The "rule that a precisely drawn, detailed statute preempts more general ~~remedies~~," *North Dakota*, 461 U.S. at 285, is fully applicable to challenges to the government's tax enforcement decisions. Indeed, given the "carefully articulated and quite complicated structure of tax laws," allowing circumvention of a specific remedy risks "destroying the existing harmony of the tax statutes." *Flora* v. *United States*, 362 U.S. 145, 157-158 (1960). See *United States* v. *Estate of Romani*, 523 U.S. 517, 532 (1998) (resolving inconsistency between general federal priority statute and the Federal Tax Lien Act of 1966 by giving effect to the 1966 Act because it "is the later statute [and] the more specific statute" which "represents Congress' detailed judgment as to when the Government's claims for unpaid taxes should yield to many different sorts of interests"); *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941) (requiring dismissal of tax refund action brought under the Tucker Act because the action was untimely under the statute of limitations specific to tax refund actions). As explained below, it would be inconsistent with Section 6404(h)'s limited remedial scheme to permit all taxpayers to bring interest-abatement claims as tax refund actions in the district courts or in the Court of Federal Claims. Taxpayers who brought such tax refund actions would be able to avoid the specific requirements of Section 6404(h), and thereby "render superfluous most of the detailed procedural protections outlined in the statute." *Smith* v. *Robinson*, 468 U.S. 992, 1011 (1984).

B. Section 6404(h) Establishes A Limited Remedy In The Tax Court For Adverse Interest Abatement Determinations

1. Section 6404(h) imposes limits on who may sue and when

a. The limitations that Section 6404(h) imposes on a taxpayer's ability to obtain relief from an adverse Section 6404(e)(1) determination support application of the settled rule that a specific remedy precludes resort to a general one. Under Section 6404(h), a taxpayer has only 180 days after the IRS's denial of a request for abatement to file a claim. By contrast, the statute of limitations for refund suits is two years from the time of denial (26 U.S.C. 6532(a)(1)). As this Court has explained, Congress's creation of a shorter statute of limitations for a specific remedial scheme strongly suggests that Congress intended the remedy to be exclusive of other potentially available remedies with longer limitations periods. See *North Dakota*, 461 U.S. at 285; accord *Abrams*, 544 U.S. at 122-125. That is particularly true when the remedy is against the United States. In that context, the shorter limitation period limits the waiver of the United States' sovereign immunity with respect to the type of action covered by the specific remedy, and it indicates a congressional intent that such actions must be brought expeditiously. See *North Dakota*, 461 U.S. at 283-285. If claimants nevertheless could pursue the general remedy, the shorter statute of limitations "could be avoided, and, contrary to the wish of Congress, an unlimited number of suits involving stale claims might be instituted." *Id.* at 285.

Thus, in *A.S. Kreider Co.*, this Court rejected a taxpayer's attempt to avoid the then-applicable statute of

limitations specific to tax refund actions. See 313 U.S. at 446. Having failed to file a timely tax refund action in compliance with that provision, the taxpayer sought to rely upon the longer, six-year statute of limitations in the Tucker Act, which applied generally to "suit[s] against the Government," including but not limited to suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 41(20) (1940). The Court rejected that attempt, reasoning that the shorter and more specific limitation period for tax refund actions would have "no meaning" if the general Tucker Act limitation period governed such actions. 313 U.S. at 448. Noting that the six-year limitation was phrased in the negative (*i.e.*, providing that "[n]o suit * * * shall be allowed" unless brought within six years of accrual), the Court held that "nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *Id.* at 447. In so holding, the Court noted the strong federal policy behind the shorter limitation period: Congress "[r]ecogniz[ed] that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws." *Ibid.* The same reasoning is equally applicable in this case, and forecloses petitioners' attempt to avoid the effect of the six-month limitation period in Section 6404(h)(1).

b. Section 6404(h) also limits the class of taxpayers who are eligible to challenge adverse interest abatement determinations; only those taxpayers whose net worth does not exceed specified amounts are entitled to seek such relief. No such limitation, however, applies to tax-refund suits. The Court has observed that "when a statute provides a detailed mechanism for judicial consider-

ation of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). Thus, the Court held that consumer suits challenging milk market orders were precluded where the statute specified a particular mechanism for administrative and judicial proceedings initiated by producers and distributors, but was silent as to consumers. *Id.* at 348 (explaining that such consumer suits would "effectively nullify Congress' intent to establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms") (internal quotation marks omitted).

Similarly, in *United States* v. *Fausto*, 484 U.S. 439 (1988), the Court held that the Civil Service Reform Act of 1978 (CSRA) precluded judicial resolution of the merits of a back-pay action brought under the Tucker Act by an individual for whose adverse employment action the CSRA provided no administrative or judicial review. The Court explained that "[t]he question we face is whether [the CSRA's] withholding of remedy was meant to preclude judicial review for those employees, or rather merely to leave them free to pursue the remedies that had been available before enactment of the CSRA." *Id.* at 443-444. Reviewing the statutory language and the "structure of the statutory scheme," *id.* at 449, the Court concluded that "[the CSRA's] deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review * * * prevents respondent from seeking review in the Claims Court under the Back Pay Act," *id.* at 455.

Similarly here, the statutory limitation on the class of individuals eligible to seek judicial review supports the conclusion that the Tax Court remedy is exclusive. The net-worth test of Section 6404(h)(1) (by way of 26 U.S.C. 7430(c)(4)(A)(ii) and 28 U.S.C. 2412(d)(2)(B)) is directly related to the role that interest plays in the administration of the internal-revenue laws as a whole. When a taxpayer is first notified by the IRS that additional taxes are owed, the taxpayer has the option of immediately paying the tax and then contesting the liability in a refund suit, or instead contesting the liability before payment in the Tax Court. If the taxpayer chooses the first option, further interest does not accrue. See 26 U.S.C. 6601(a); see also Rev. Proc. 2005-18, 2005-1 C.B. 798, 798-799; Rev. Proc. 84-58, § 5, 1984-2 C.B 501, 503. Thus, taxpayers who can and do pay the additional tax liability asserted by the IRS before contesting that liability never risk being liable for the interest that would otherwise accrue, and they have no need for a mechanism for seeking (and challenging the denial of) interest abatement. It is only those taxpayers who are unable to pay the additional tax liability asserted by the IRS, or who choose not to do so, for whom judicial review of interest abatement determinations is potentially relevant.[5]

Limiting judicial review of the Secretary's interest abatement decisions to those taxpayers whose net worth

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[5] The Secretary lacks authority, under Section 6404(e)(1), to abate interest attributable to errors and delays occurring before the IRS first contacts the taxpayer in writing regarding the deficiency. 26 U.S.C. 6404(e)(1); 26 C.F.R. 301.6404-2(a)(2); *Beall* v. *United States*, 335 F.Supp.2d 743, 751 (E.D. Tex. 2004), aff'd on other grounds, 467 F.3d 864, 867-868 (5th Cir. 2006); *Donovan* v. *Commissioner*, 80 T.C.M. (CCH) 78, 80 (July 21, 2000).

does not exceed specified amounts thus reflects the fact that taxpayers with ample resources may protect themselves against interest costs simply by paying the contested amount when they are first notified by the IRS. The statute reflects Congress's common sense judgment that such taxpayers do not require judicial review as a protection against the possibility that the Secretary might abuse the discretion conferred by Section 6404(e)(1). Cf. *Fausto*, 484 U.S. at 448-449 ("[T]he absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action.").

Moreover, interest under the Internal Revenue Code is not intended as a penalty, but is merely a charge for the time-value of money. Even if the amount of interest owed under Section 6511 increases because of errors or delays by IRS employees in performing ministerial acts, the taxpayer still had the use of the money during that time. A taxpayer who was able to invest the money would presumably have earned a financial return sufficient to offset some or all of the interest accruing on his unpaid tax debt. The net-worth test of Section 6404(h) thus reflects the fact that small taxpayers may benefit from the protection of judicial review, whereas large taxpayers can typically protect themselves against administrative errors and delays simply by paying the tax asserted to be due or by investing their money elsewhere. See *Estate of Kunze* v. *Commissioner*, 233 F.3d 948, 955 (7th Cir. 2000) (noting that to a large taxpayer, the cost of posting a bond or paying in advance is merely "the opportunity cost of lost interest income"). Accord-

ingly, the features of Section 6404(h) support the conclusion that Congress intended to limit judicial review of interest abatement determinations to those taxpayers who were less likely to be in a position to protect themselves against increased interest liability by prepaying the contested amount, and who file their claims within 180 days of the denial of a request for abatement. See *Abrams*, 544 U.S. at 124 (This Court's cases "adopt the * * * assumption * * * that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through [another statute].").

2. Congress enacted Section 6404(h) against a backdrop of decisions uniformly precluding judicial relief for Section 6404(e)(1) claims

Congress's understanding, at the time it enacted Section 6404(h), that claimants "had no effective judicial remedy," *Brown*, 425 U.S. at 828, also supports application of the settled rule that a specific remedy forecloses judicial relief by other means. Under this Court's precedents, if Congress believed that it was providing a remedy where none previously existed, or where any potential remedies were "problematic," the inference to be drawn is that the specific remedy is exclusive. *North Dakota*, 461 U.S. at 285; see *Brown*, 425 U.S. at 826-829.

Applying those principles, the Court in *Brown* relied in part on the observation that Congress was "persuaded that federal employees who were treated discriminatorily had no effective judicial remedy" when Congress enacted Section 717, which the Court construed to provide the "exclusive judicial remedy" for such discrimination. 425 U.S. at 828. Similarly, in *North Dakota* the Court held that Congress intended the Quiet Title Act of 1972, 28 U.S.C. 2409a, "to provide the exclusive means

by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286. In so doing, the Court rejected the availability of a so-called "officer's suit" against the federal officials who oversaw the disputed land. *Id.* at 284-285. The Court placed great weight on the fact that Congress included a twelve-year statute of limitations and other restrictions on its waiver of the United States' sovereign immunity in the Quiet Title Act, restrictions that would be "rendered nugatory" if an officer's suit were an available alternative remedy. *Id.* at 285. The Court also pointed to Congress's understanding that officers' suits were not an available remedy, *id.* at 282, or at least that "it was 'problematic' whether any judicial relief at all was available" before passage of the Quiet Title Act, *id.* at 285 (quoting *Brown*, 425 U.S. at 826).

Section 6404(h) was enacted in 1996 against the background understanding that, when the Secretary declined to abate interest, no judicial review was available. Every court of appeals to consider the matter had refused to permit a taxpayer to obtain judicial review of an adverse interest abatement determination, as had several district courts and the Claims Court. See *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991); *Estate of Andrews* v. *United States*, 850 F. Supp. 1279 (E.D. Va. 1994); *Brahms* v. *United States*, 18 Cl. Ct. 471 (1989). See also *Bax* v. *Commissioner*, 13 F.3d 54, 58 (2d Cir. 1993) ("[W]e note substantial authority for the view that interest abatement under section 6404(e)(1) is a discretionary form of relief within the sole authority of the Commissioner and is thereby be-

yond the scope of judicial review."). No court had permitted a taxpayer's Section 6404(e)(1) claim to proceed.

Congress was well aware of those precedents. In describing then-present law, the House Committee on Ways and Means stated that "[f]ederal courts generally do not have the jurisdiction to review the IRS's failure to abate interest." H.R. Rep. No. 506, at 28. Section 6404(h) resolved that problem by providing a specific mechanism to implement Congress's view that "it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers." *Ibid.* Because Section 6404(h) was enacted on the understanding that taxpayers could not previously obtain judicial review of the Secretary's determinations under Section 6404(e)(1), *North Dakota* and *Brown* support the conclusion that the limited remedy in the Tax Court is exclusive.[6]

Had Congress wanted to overturn the judicial decisions holding that the district courts could not adjudicate taxpayer challenges to Section 6404(e)(1) determinations, it could have done so in a straightforward and

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[6] Petitioners rely (Pet. Br. 32) on the Committee Report's statement that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest." H.R. Rep. No. 506, at 28. That statement is of no assistance to petitioners, however, because it merely disclaimed any inference as to "present law"—*i.e.*, the state of the law *prior* to enactment of Section 6404(h)—regarding the existence *vel non* of federal court jurisdiction to review interest abatement determinations. Whatever the correct resolution of that question, Congress clearly recognized that the federal courts had consistently rejected efforts by taxpayers to obtain such review, and Congress chose to remedy that situation prospectively by expressly conferring jurisdiction on the Tax Court alone. As discussed in the text, when Congress creates a remedy in such circumstances, it is generally deemed exclusive.

direct way by expressly providing for judicial review in those courts. Instead, Congress created only a limited remedy in the Tax Court. That congressional judgment should be respected.

C. When Congress Establishes A Specific Review Procedure, That Procedure Is Generally Regarded As Exclusive

In holding that Section 6404(h) vests exclusive jurisdiction in the Tax Court, the court of appeals relied (Pet. App. 12) in part on the principle that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) (citing cases). In *Whitney*, the Court explained that, in establishing a particular statutory review procedure, Congress intended to permit an agency—there, the Federal Reserve Board—to pass on matters within its area of expertise, including a bank holding company's plan to own and operate a new national bank. *Ibid.* Because "permit[ting] a district court to make the initial determination * * * would substantially decrease the effectiveness of the statutory design," *ibid.*, by, among other things, producing "conflicting determinations," *id.* at 422, the Court ruled that the special review procedure was "exclusive" despite "the absence of an express statutory command of exclusiveness," *ibid.*

The principle that a statutory review procedure is exclusive applies not only to the administrative process but also to Congress's allocation of judicial review authority. When Congress confers such authority on a particular court or courts, that conferral of jurisdiction

is properly understood to be exclusive. See, *e.g.*, *Greater Detroit Res. Recovery Auth.* v. *EPA*, 916 F.2d 317, 321 (6th Cir. 1990) ("It is a well settled principle that where Congress establishes a special statutory review procedure for administrative action, that procedure is generally the exclusive means of review for those actions."); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 475 (11th Cir. 1984) ("It is well settled that if Congress, as here, specifically designates a forum for judicial review of administrative action, that forum is exclusive. And this result does not depend on Congress using the word 'exclusive' in the statute providing for a forum for judicial review.") (quoting *Gardner* v. *Alabama*, 385 F.2d 804, 810 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968)). That principle is embodied in the Administrative Procedure Act, which provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. 703.

The rule that a special statutory review procedure is generally exclusive reinforces the conclusion that Section 6404(h) provides the sole means for a taxpayer to challenge an adverse Section 6404(e)(1) determination. Channeling initial judicial review to a single court will enhance tax administration by enabling that court to develop greater expertise and by facilitating the development of a more uniform and consistent approach to interest abatement issues. See, *e.g.*, *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) ("[C]ourts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise."). By contrast, permitting the district courts and the Court

of Federal Claims to make the initial determinations about errors and delays in the ministerial (and, for later years, managerial) acts of tax administration would immerse those courts in the internal procedures of the IRS and threaten to burden tax administration with divergent and conflicting decisions.[7] That result would "substantially decrease the effectiveness of the statutory design." *Whitney Nat'l Bank*, 379 U.S. at 420.[8]

D. The Fifth Circuit's Decision In *Beall* Is Incorrect

Neither petitioners nor the Fifth Circuit in *Beall* v. *United States*, 336 F.3d 419 (2003), have offered a sound reason to disregard the settled and complementary rules that a specific remedy precludes resort to a general one and that a special review procedure is generally re-

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[7] The problem of divergent authorities might be exacerbated by the absence of concrete statutory guidance on when interest should be abated. See, *e.g.*, *Selman* v. *United States*, 941 F.2d 1060, 1063 (10th Cir. 1991) ("Although the statute authorizes the Secretary to abate interest attributable to certain IRS errors or delays, it neither indicates that such authority should be used universally nor provides any basis for distinguishing between the instances in which abatement should and should not be granted."). Although conflicting authority may still develop among the courts of appeals, review by the numerous district courts and the Court of Federal Claims is more likely to frustrate uniformity. Cf. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002) (review by "thousands of federal- and state-court judges" "could only result in the sort of 'multiple interpretations'" that the law sought to avoid (citation omitted)).

[8] In *Freytag* v. *Commissioner*, 501 U.S. 868, 885-889 (1991), the Court held that, for purposes of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, the Tax Court is not a "Department" of the Executive Branch. The fact remains, however, that the Tax Court "is a specialized court with expertise in tax matters." Pet. App. 13.

garded as exclusive.[9] In holding that the Tax Court's jurisdiction was not exclusive, the Fifth Circuit reasoned that, by enacting Section 6404(h), "Congress clearly expressed its intent that the decision to abate interest no longer rest entirely within the Secretary's discretion." Pet. App. 30. But Congress expressed that intent in the context of establishing a specific, limited remedy that by its plain terms subjects the Secretary's interest abatement decision to review only by the Tax Court and at the behest of only a subset of all taxpayers.

The question is whether Congress intended for that remedy to be exclusive or instead intended to permit taxpayers, including taxpayers who are not even eligible to avail themselves of the limited remedy, to pursue refund actions under other remedial schemes. Section 6404(h) no doubt indicates "that the abatement decision is no longer committed solely to agency discretion," as the Fifth Circuit observed (Pet. App. 30), but that observation says nothing about *where* Congress intended challenges to the Secretary's exercise of discretion to be brought, nor does it specify whether Congress intended taxpayers who are ineligible to pursue the limited remedy to obtain relief by other means. If the indication that there is now law to apply had come from some distinct legislative enactment, there might be something to the Fifth Circuit's reasoning. But when the only indication that an issue is not committed to agency discretion comes in the very legislation that creates a limited forum- and plaintiff-specific remedy, the far more natural inference is that the new regime is exclusive. For all

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[9] Moreover, even if Section 6404(h) were ambiguous, under principles of sovereign immunity, any doubt about whether Section 6404(h) is an exclusive remedy must be resolved in favor of the government. See, *e.g.*, *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 646 (2006).

the reasons discussed above, Congress intended challenges to adverse Section 6404(e)(1) decisions to be brought exclusively in the Tax Court subject to Section 6404(h)'s express limitations.

1. The canon of implied repeal does not assist petitioners

The Fifth Circuit reasoned that it would not read the Tax Court's jurisdiction to be exclusive because "[r]epeals by implication * * * are disfavored." Pet. App. 34; see Pet. Br. 28-29. The court's reliance on that canon is fundamentally misplaced.

The implied-repeal canon presupposes that giving effect to one statute would mean denying effect to another, and rests on the common sense assumption "that Congress will specifically address language on the statute books that it wishes to change." *Fausto*, 484 U.S. at 453. But that assumption has no application when Congress had no reason to believe, at the time it legislated, that preexisting "language on the statute books" provided a different answer to the problem being addressed.[10] This Court's decision in *United States* v. *Estate of Romani*, 523 U.S. 517 (1998), is instructive. There, the question presented was whether a federal tax claim would be given preference over a secured creditor's lien on real property, when the federal tax claim was not valid under the Federal Tax Lien Act of 1966. The government contended that the tax claim was valid under the more general federal priority statute, which

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[10] That principle applies with particular force here, where the statutory basis for judicial review (*i.e.*, that there now is a standard to apply to the Secretary's determination) was enacted as part of the same legislation that created a limited remedy in the Tax Court and was therefore not "on the statute books" for purposes of any implied-repeal analysis.

predated the 1966 Act. Because the "basic question" of whether the preexisting priority statute accorded the government a preference over secured creditors had never been resolved, the Court held that it was not "appropriate to view the issue in this case as whether the Tax Lien Act of 1966 has implicitly amended or repealed the priority statute." 523 U.S. at 530.

Romani's rationale for rejecting application of the implied-repeal canon applies with even greater force here. Before Section 6404(h) was enacted, all of the federal courts to have addressed the issue were in agreement that a refund action did not lie to recover unabated Section 6404(e)(1) interest, because the matter was committed to agency discretion. See, *e.g.*, *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991); see also Pet. Supp. App. 89-94 & nn.10-13. Petitioners argue (Pet. Br. 35-36) that those courts erred in applying the APA in the context of a tax refund suit.[11] The relevant point for implied-repeal analysis, however, is that when Congress created the Section 6404(h) remedy, Section 6404(e)(1) had not been authoritatively construed to create a right to obtain judicial review of an adverse interest abatement decision. To the contrary, the courts had uniformly construed Section 6404(e)(1) not to create any judicially enforceable right. In those circumstances, Congress had no reason to believe that it was eliminating any taxpayer rights when it enacted

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[11] But see Pet. Br. 36 ("The APA codified well-established common law rules of judicial preclusion, and the analysis is equally applicable to non-APA cases."). The United States believes that those decisions were correct for the reasons they provided.

Section 6404(h) to provide a remedy for certain taxpayers in the Tax Court.

When Congress believes that it is providing a remedy where none previously existed, or where any potential remedies were "problematic," this Court does not apply the implied-repeal canon; rather, it applies the rule that the remedy Congress provides is exclusive. See *North Dakota*, 461 U.S. at 285; *Brown*, 425 U.S. at 826-829; see also *Romani*, 523 U.S. at 530. Implied-repeal analysis is particularly inappropriate because the general remedy "creates no rights but merely provides a civil cause of action to remedy 'some otherwise defined federal right.'" *Abrams*, 544 U.S. at 120 n.2 (quoting *Novotny*, 442 U.S. at 376). Thus, in *Abrams* the Court held that the individually enforceable rights created by 47 U.S.C. 332(c)(7) could be enforced only through the remedy authorized by that provision, notwithstanding that those rights otherwise would have been enforceable within the remedial framework of the earlier-enacted 42 U.S.C. 1983. 544 U.S. at 127. The Court explained that "[c]onstruing § 332(c)(7), as we do, to create rights that may be enforced only through the statute's express remedy, leaves the pre-[Telecommunications Act] operation of § 1983 entirely unaffected." *Id.* at 126.

Similarly, in *Novotny*, the Court held that the deprivation of a right created by Title VII could not be the basis for a cause of action under the earlier-enacted 42 U.S.C. 1985(3), but could only be enforced through Section 717 of Title VII. 442 U.S. at 376-378. The case did not present a question of implied repeal, the Court held, because "Section 1985(3) * * * *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right * * * is breached." *Id.* at 376. Rather, the Court

applied the analysis of *Brown* to conclude that the specific remedy in Title VII foreclosed resort to the more general remedy in Section 1985(3).

Like 42 U.S.C. 1983 and 1985(3), the tax refund statutes—28 U.S.C. 1346(a)(1), 1491(a)(1), and 26 U.S.C. 7422—create no substantive rights, but merely provide a remedial framework within which taxpayers may contest the collection of amounts alleged to be excessive under the governing substantive provisions of the Tax Code. Accordingly, under *Abrams* and *Novotny*, the creation of a new remedial framework (*i.e.*, Section 6404(h)) for the enforcement of the relevant substantive right (*i.e.*, Section 6404(e)(1)) limits enforcement to the newly enacted remedial framework and does not implicate the implied-repeal canon.[12]

2. Exclusive Tax Court jurisdiction is consistent with the general structure of the Tax Code

Contrary to the view of the Fifth Circuit, exclusive Tax Court jurisdiction over Section 6404(e)(1) claims is not "inconsistent with the general structure of the Internal Revenue Code." Pet. App. 36. In general, when a

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[12] Petitioners mistakenly contend (Pet. Br. 29) that reading Section 6404(h) to vest exclusive jurisdiction in the Tax Court "repeal[s]" refund jurisdiction that previously existed. The refund provisions operate no differently after Section 6404(h)'s enactment than they did pre-enactment. Petitioners suggest that there is a difference in that the district courts and Court of Federal Claims previously had refund jurisdiction but simply determined that they could not exercise it. But for purposes of understanding the practical problem that Congress was addressing, the distinction petitioners seek to draw is not meaningful. Cf. *Community Nutrition Inst.*, 467 U.S. at 353 n.4 ("[C]ongressional preclusion of judicial review is in effect jurisdictional."). The reality was that no judicial relief was available, and Congress created a remedy in the Tax Court on that understanding.

taxpayer disputes the tax liability determined by the IRS, he may obtain a determination of that liability either by the Tax Court, see 26 U.S.C. 6213(a), or, if the taxpayer has paid the tax in full, by a federal district court or the Court of Federal Claims.[13] The Tax Court also has jurisdiction, in an increasing number of circumstances, to review administrative determinations by the IRS that do not pertain to the taxpayer's substantive tax liability.[14] The terms of Tax Court and district court (and Court of Federal Claims) jurisdiction in those cases are instructive, because they illustrate that the Tax Court has exclusive jurisdiction to review such administrative matters unless Congress expressly provides otherwise.

Section 6330(d) of the Code permits taxpayers to obtain judicial review of certain administrative determinations pertaining to the collection of taxes. As originally enacted, the statute permitted taxpayers to appeal to the Tax Court in some cases (and granted the Tax Court jurisdiction to hear those cases) and to district courts in all other cases (without a parallel grant of jurisdiction).[15] 26 U.S.C. 6330(d)(1). The Court of Federal

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[13] Full payment of the disputed amount (following the issuance of a notice of deficiency) does not, however, divest the Tax Court of jurisdiction. 26 U.S.C. 6213(b)(4); *Richter* v. *Commissioner*, 16 B.T.A. 936, 937 (1929); *De Sabichi* v. *Commissioner*, 4 B.T.A. 445, 447 (1926). In such cases the Tax Court retains authority to determine overpayments and, if necessary, to order refunds. 26 U.S.C. 6512(b).

[14] That Congress originally created the Tax Court's predecessor (the Board of Tax Appeals) as a forum for the pre-payment determination of tax liability, as petitioners point out (Pet. Br. 30-31), does not prevent Congress from assigning additional functions to the Tax Court, and Congress clearly has done so.

[15] As originally enacted, Section 6330(d)(1) (Supp. IV 1998) (App., *infra*, 4a) provided:

Claims has no jurisdiction to review collection determinations. *Ibid.*; *Fry* v. *United States*, 72 Fed. Cl. 500, 504-505 (2006). Several courts held that the Tax Court's Section 6330(d) jurisdiction, where it exists, is exclusive. *E.g.*, *Redeker-Barry* v. *United States*, 476 F.3d 1189, 1191 (11th Cir. 2007) (per curiam); *Voelker* v. *Nolen*, 365 F.3d 580, 581 (7th Cir. 2004); *Marino* v. *Brown*, 357 F.3d 143, 146 (1st Cir. 2004). Congress recently revised Section 6330(d) to give the Tax Court exclusive jurisdiction in all cases arising under Section 6330. Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 1019; see App., *infra*, 5a.

The Tax Court also has jurisdiction to review the IRS's administrative determinations regarding innocent spouse relief under 26 U.S.C. 6015(e). Unlike Sections 6330(d) and 6404(e)(1), however, Section 6015(e)(1)(A) specifies that Tax Court jurisdiction exists "[i]n addition to any other remedy provided by law." 26 U.S.C. 6015(e)(1)(A) (App., *infra*, 1a-2a). Section 6015(e) also sets out a procedure under which, if a refund suit regarding the same liability is filed in a district court (or the Court of Federal Claims), jurisdiction to review the administrative determination regarding innocent spouse relief will be transferred from the Tax Court to the dis-

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(d) Proceeding After Hearing.—

(1) JUDICIAL REVIEW OF DETERMINATION.—The person may, within 30 days of a determination under this section, appeal such determination—

(A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

trict court (or the Court of Federal Claims). 26 U.S.C. 6015(e)(3) (App., *infra*, 3a).

Tax Court jurisdiction under Section 6404(h), like Tax Court jurisdiction under Sections 6330(d) and 6015(e), entails review of an administrative determination. In each case, the administrative determination pertains not to the proper determination of the taxpayer's substantive tax liability under the Internal Revenue Code, but rather to the incidents of tax administration. There is no reason for the scheme of Tax Court review of such administrative determinations to match the scheme applicable to determinations of substantive tax liability.[16] To the contrary, examination of Sections 6015(e), 6330(d), and 6404(h) indicates that Tax Court jurisdiction is exclusive in such cases unless the statute expressly provides otherwise.

3. Exclusive review in the Tax Court does not create any anomalies, let alone anomalies that would justify departing from Section 6404(h)'s text

The Fifth Circuit further reasoned that exclusive Tax Court review would create "anomalies." As the court below correctly concluded (Pet. App. 16), however, the "anomalies" identified by the Fifth Circuit do not justify departure from "a statute that is clear on its face."

a. The first of those—that wealthy taxpayers will be without recourse to judicial review—is no anomaly at all:

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[16] For this reason, petitioners err in relying (Pet. Br. 24) upon statutes that extend the Tax Court's jurisdiction in those cases where it already has jurisdiction to make a de novo determination of tax liability. The extensions of Tax Court jurisdiction under Sections 6621(c) and 7481(d), for example, both depend upon the existence of such de novo review jurisdiction. See 26 U.S.C. 6621(c)(4) (1988) (repealed 1989), 7481(d).

as noted in Part B(1)(b) above, Congress intended to fashion relief only for taxpayers of relatively limited financial means. See H.R. Rep. No. 506, at 28 ("[I]t is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to *certain taxpayers.*") (emphasis added).

Petitioners now assert (Pet. Br. 44-48) that the net-worth limitation would violate the due process rights of many taxpayers. Petitioners concede (*id.* at 44), however, that there is no evidence in the record that their net worth exceeds the statutory limit, and accordingly they lack standing to bring a facial constitutional challenge. See *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). A facial challenge is strongly disfavored in any event. See, *e.g.*, *NEA* v. *Finley*, 524 U.S. 569, 580 (1998) ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'") (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

Moreover, the notion that there is a due process entitlement to obtain judicial review of adverse Section 6404(e)(1) decisions lacks merit. See *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974) ("The right of access to the courts * * * is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning *violations of fundamental constitutional rights.*") (emphasis added). Prior to the 1996 amendments, no taxpayer could obtain review of agency interest-abatement determinations in any court, and

there is no plausible basis for suggesting that the absence of such review was constitutionally problematic.

The Fifth Amendment's Due Process Clause has been construed to contain an equal protection component, but any claim that the net-worth limitation violates equal protection would similarly lack merit. See *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 24, 44 (1973) (observing that "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages" and applying rational-basis review). There is plainly a rational basis for the net-worth limitation in Section 6404(h). As the court of appeals pointed out (Pet. App. 16), that wealth limitation is also found in Section 7430 and is ultimately derived from the more generally applicable Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(2)(B) (1986). See *Richard* v. *Hinson*, 70 F.3d 415 (5th Cir. 1995) (upholding EAJA net-worth provision against equal protection challenge), cert. denied, 518 U.S. 1004 (1996). And, as explained above, see Part B(1)(b), *supra*, taxpayers with a high net worth are financially better positioned to make an advance payment or deposit to stop the accrual of interest in the first place. See *Kunze*, 233 F.3d at 954-955. Petitioners concede (Pet. Br. 46) that it would be reasonable for Congress to demand that high net-worth taxpayers make an advance payment before initiating a refund suit. It is equally reasonable to expect such taxpayers to make payments before interest accrues in the first place.

Petitioners attempt to bolster their due process argument by suggesting (Pet. Br. 45-46) that Tax Court jurisdiction in Section 6404(h) cases is also restricted by the "prevailing party" rules of 28 U.S.C. 2412(d)(1)(B)

(1986).[17] Petitioners assert (Pet. Br. 45) that they would have been barred from the Tax Court under that restriction. But 28 U.S.C. 2412(d)(1)(B) (1986) does not operate as such a bar. To be sure, Section 6404(h)(1) references "the requirements referred to in section 7430(c)(4)(A)(ii)," and that provision, in turn, refers to two sets of requirements: the net-worth requirements set forth in 28 U.S.C. 2412(d)(2)(B) (1986), as discussed above, and "the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court." 26 U.S.C. 7430(c)(4)(A)(ii). The first sentence of Section 2412(d)(1)(B) provides that:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. 2412(d)(1)(B) (1986). Petitioners here are not "[a] party seeking an award of fees and other expenses," and there was no preexisting "action" and thus no "final

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[17] Petitioners' assertion (Pet. Br. 45) that the court of appeals "ignor[ed]" this problem is incorrect. Petitioners did not raise this argument in that court, while the government pointed out (albeit in passing) that "Congress meant to refer only to the net worth requirements of Section 7430." Gov't C.A. Br. 37-38 (citing H.R. Rep. No. 506, at 28).

judgment" or "prevailing party." See Pet. Br. 45. From those facts, petitioners conclude that they could not qualify for Tax Court jurisdiction under 26 U.S.C. 6404(h) (Supp. IV 2004) (and indeed that "very few taxpayers will ever [so] qualify"). Pet. Br. 45.

Petitioners are plainly mistaken. By its express terms, the requirements imposed by the first sentence of 28 U.S.C. 2412(d)(1)(B) apply only to parties "seeking an award of fees and other expenses," and thus have no relevance or application to litigants like petitioners who are instead seeking an abatement of interest under Section 6404. Petitioners' strained reading is contrary to the text of the statute and would lead to nonsensical results. It should be rejected.[18]

b. The second "anomaly" identified by the Fifth Circuit is that a taxpayer may have to bring an interest abatement claim and a substantive refund claim in separate fora.[19] As discussed above, an interest abatement claim under Section 6404(e)(1) is based on the incidents of tax administration, not the determination of substantive tax liability under the Internal Revenue Code. Be-

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[18] While the legislative history is clear with respect to the net-worth limitation, it (not surprisingly) gives no indication that Congress intended to restrict Tax Court jurisdiction to "prevailing parties" seeking fees and costs within thirty days after "final judgment." See H.R. Rep. No. 506, at 28 ("An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees."). The United States is not aware of any case in which the Tax Court has dismissed a Section 6404(h) case for failure to meet the "prevailing party" requirement set forth in Section 7430(c)(4)(A)(ii). Cf. *Fisher* v. *Commissioner*, 80 T.C.M. (CCH) 338 (Sept. 5, 2000) (denying attorney's fees because taxpayers did not qualify as "prevailing parties" but denying interest abatement claims only as "premature").

[19] Petitioners concede (Pet. Br. 49) that this issue does not arise in their case because they have no remaining substantive refund claims.

cause such a claim raises issues entirely distinct from the taxpayer's substantive liability, implicates a different standard of review, and requires an evaluation of the internal processes of the IRS, there is nothing anomalous about channeling initial review of such claims to the Tax Court. Moreover, the vast majority of taxpayers raise their substantive claims in the Tax Court rather than the district courts or the Court of Federal Claims. See Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional*, 5 Fla. Tax Rev. 357, 412 (2001) ("[T]he Tax Court hears about 95% of litigated federal tax cases."). Those taxpayers must split their deficiency and interest abatement claims in any event, because the interest abatement claim does not become ripe until an assessment is made, which generally cannot occur until completion of the Tax Court deficiency proceedings. See 26 U.S.C. 6213(a), 6215(a); 26 U.S.C. 6404(e)(1) ("the Secretary may abate the *assessment* of all or any part of such interest") (emphasis added); *508 Clinton St. Corp.* v. *Commissioner*, 89 T.C. 352, 356 (1987) ("[S]ection 6404(e) cannot operate until our decision with respect to petitioner's underlying deficiencies becomes final, after which [the IRS] may assess such deficiencies, including the interest attributable thereto.").

Petitioners err in suggesting (Pet. Br. 48-49) that construing Section 6404(h) as exclusive would require the splitting of a single claim, with preclusive effects on the second litigation. Because a taxpayer cannot bring an interest abatement claim in a refund suit in district court or the Court of Federal Claims, claim preclusion

could not apply.[20] See, *e.g.*, Restatement (Second) of Judgments § 26(1)(c) (1982).

E. This Court Presumes That An Agency Will Act In Good Faith

Finally, petitioners argue (Pet. Br. 50) that if the Tax Court has exclusive jurisdiction over claims under Section 6404(e)(1), the result would be to leave them "at the mercy of the IRS," which, they argue, might simply fail to process the administrative claim for abatement. That hypothetical possibility however, is created only by Congress's decision to condition the availability and timing of review under Section 6404(h)(1) on the Secretary's final determination not to abate interest. In choosing that language, Congress evidently legislated against a background assumption that the agency would not withhold action in bad faith. This Court likewise routinely presumes that an agency will carry out its responsibilities in good faith. See, *e.g.*, *USPS* v. *Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."). There is no basis for deviating from that background assumption here. The IRS acted upon (and denied) petitioners' Section 6404(e)(1) claim, see Pet. Br. 6, and they offer no basis for concluding that the IRS is frustrating Section

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[20] Of course, if a taxpayer's substantive refund claims succeeded, the interest would abate automatically (and, indeed, the government might well owe the taxpayer interest on the overpayment), thus mooting any separate claim for interest abatement. The opposite, however, is not true: if the government prevailed in the substantive refund case, the interest abatement claim might still proceed. And should the interest abatement claim be resolved first, the outcome would have no impact on the taxpayer's substantive liability.

6404(h)'s exclusive review scheme.[21] In any event, if problems ever arose, it would be the province of Congress to address them.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[21] The taxpayers in *Beall* did file their action in district court before the IRS acted on their administrative claim, but they brought suit less than one year after submitting that claim. Pet. App. 19. In *Bourekis* v. *Commissioner*, 110 T.C. 20, 26 (1998), relied upon by petitioners (Pet. Br. 50), the IRS did not deny a request for interest abatement for the simple reason that the taxpayer never made an administrative request for such relief.

STATUTORY APPENDIX

1. Section 6015(e)(1) of Title 26, United States Code, as amended by Tax Relief and Healthcare Act of 2006, Pub. L. No. 109-432, Div. C, Tit. IV, 408(a),(b), 120 Stat. 3061-3062 provides:

(e) Petition for review by Tax Court

(1) In general

In the case of an individual against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply, or in the case of an individual who requests equitable relief under subsection (f)—

(A) In general

In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed—

(i) at any time after the earlier of—

(I) the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual, or

(II) the date which is 6 months after the date such election is filed or request is made with the Secretary, and

(ii) not later than the close of the 90th day after the date described in clause (i)(I).

(B) Restrictions applicable to collection of assessment

(i) In general

Except as otherwise provided in section 6851 or 6861, no levy or proceeding in court shall be made, begun, or prosecuted against the individual making an election under subsection (b) or (c) or requesting equitable relief under subsection (f) for collection of any assessment to which such election or request relates until the close of the 90th day referred to in subparagraph (A)(ii), or, if a petition has been filed with the Tax Court under subparagraph (A), until the decision of the Tax Court has become final. Rules similar to the rules of section 7485 shall apply with respect to the collection of such assessment.

(ii) Authority to enjoin collection actions

Notwithstanding the provisions of section 7421(a), the beginning of such levy or proceeding during the time the prohibition under clause (i) is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this subparagraph to enjoin any action or proceeding unless a timely petition has been filed under subparagraph (A) and then only in respect of the amount of the assessment to which the election under subsection (b) or (c) relates or to which the request under subsection (f) relates.

2. Section 6015(e)(3) of Title 26, United States Code, provides:

* * * * *

(3) Limitation on Tax Court jurisdiction. If a suit for refund is begun by either individual filing the joint return pursuant to section 6532—

(A) the Tax Court shall lose jurisdiction of the individual's action under this section to whatever extent jurisdiction is acquired by the district court or the United States Court of Federal Claims over the taxable years that are the subject of the suit for refund, and

(B) the court acquiring jurisdiction shall have jurisdiction over the petition filed under this subsection.

3. Section 6213(a) of Title 26, United States Code, provides:

Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the

expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

4. Section 6330(d)(1) (Supp. IV 1998) of Title 26, United States Code, provided:

Notice and opportunity for hearing before levy

* * * * *

(d) Proceeding after hearing

(1) Judicial review of determination

The person may, within 30 days of a determination under this section, appeal such determination—

(A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

* * * * *

5. Section 6330(d)(1) of Title 26, United States Code, as amended by Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 1019 provides:

Notice and opportunity for hearing before levy

* * * * *

(d) Proceeding after hearing.—

(1) Judicial review of determination

The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

* * * * *

6. Section 6404(e)(1)(1994) of Title 26, United States Code, provides:

(e) Assessments of interest attributable to errors and delays by Internal Revenue Service.

(1) In general

In the case of any assessment of interest on—

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

7. Section 6404(e)(1)(Supp. II 1996) of Title 26, United States Code, provides:

* * * * *

Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service

(1) In general

In the case of any assessment of interest on—

(A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial or managerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any unreasonable error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial or managerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

* * * * *

8. Section 6404(h)(Supp. IV 2004) of Title 26, United States Code, provides:

* * * * *

Review of denial of request for abatement of interest

(1) In general

The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

(2) Special rules

(A) Date of mailing

Rules similar to the rules of section 6213 shall apply for purposes of determining the date of the mailing referred to in paragraph (1).

(B) Relief

Rules similar to the rules of section 6512(b) shall apply for purposes of this subsection.

(C) Review

An order of the Tax Court under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

* * * * *

9. Section 6512(b) of Title 26, United States Code, provides:

* * * * *

Limitations in case of petition to Tax Court

(b) Overpayment determined by Tax Court

(1) Jurisdiction to determine

Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year, or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to

any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

(2) Jurisdiction to enforce

If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest. An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(3) Limit on amount of credit or refund

No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511 (b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511 (b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency—

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

In the case of a credit or refund relating to an affected item (within the meaning of section 6231 (a)(5)), the preceding sentence shall be applied by substituting the periods under sections 6229 and 6230(d) for the periods under section 6511(b)(2), (c), and (d).

In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years.

(4) Denial of jurisdiction regarding certain credits and reductions.

The Tax Court shall have no jurisdiction under this subsection to restrain or review any credit or reduction made by the Secretary under section 6402.

* * * * *

10. Section 6532(a)(1)-(2) of Title 26, United States Code, provides:

Periods of-limitation on suits

(a) Suits by taxpayers for refund

(1) General rule

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of Time

The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpaper and the Secretary.

* * * * *

11. Section 7422 of Title 26, United States Code, provides:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

12. Section 7430(c)(4)(A) of Title 26, United States Code, provides:

* * * * *

Awarding of costs and certain fees

(4) Prevailing party

(A) In general

The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)—

(i) which—

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

* * * * *

13. Section 1346 of Title 28, United States Code, provides:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

14. Section 1491(a)(1) of Title 28, United States Code, provides in pertinent part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express implied contract with the United States.

15. Section 2412(d)(1)(B)(Supp. IV 1986) of Title 28, United States Code, provides in pertinent part:

Costs and fees

(d)(1)

* * * * *

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party

stating the actual time expended and the rate at which fees and other expenses were computed.

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16. Section 2412(d)(2)(B)(Supp. IV 1986) of Title 26, United States Code, provides:

(d)(2)

* * * * *

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

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